



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME LOCAL 3438/SULLIVAN COUNTY	:	
NURSING HOME EMPLOYEES	:	
	:	
v.	:	CASE NO. A-0491:1
	:	
SULLIVAN COUNTY NURSING HOME	:	
SULLIVAN COUNTY COMMISSIONERS,	:	
OMER AHERN, JR., CHAIRMAN	:	
	:	
AND	:	DECISION NO. 92-156
	:	
SULLIVAN COUNTY COMMISSIONERS AND	:	
ROBERT HEMENWAY, ADMINISTRATOR OF	:	
THE SULLIVAN COUNTY NURSING HOME	:	
	:	
v.	:	
	:	
AFSCME, COUNCIL 93	:	CASE NO. A-0491:2
AFSCME, LOCAL 3438/SULLIVAN COUNTY	:	
NURSING HOME EMPLOYEES	:	

APPEARANCES

Representing Sullivan County Commissioners and Robert Hemenway, Administrator of the Sullivan County Nursing Home:

Kathleen C. Peahl, Esquire, Counsel

Representing AFSCME Local 3438:

Vincent A. Wenners, Jr., Counsel

Also Appearing:

Robert Hemenway, Sullivan County
Richard Breen, Sullivan County
Omer C. Ahern, Jr., Sullivan County
James C. Anderson, AFSCME
Stephanie Mills, AFSCME
Sandie Dunn
Tracy Foisy, AFSCME
Crystal Anderson
Judy McDonald, Sullivan County Nursing Home
Roger Small
Bruce Campbell
Betty Foy, Sullivan County Nursing Home
Jeannette Clayton, Sullivan County Nursing Home
Brenda Cotu, Sullivan County Nursing Home
Bonnie L. Rivard, R.N., Sullivan County Nursing Home
Lisa Scruton, L.P.N., Sullivan County Nursing Home
Dennis M. Howard, Sullivan County Nursing Home

BACKGROUND

These are cross charges of unfair labor practices filed by AFSCME Local 3438 and the Sullivan County Commissioners. The charges relate to an incident occurring in June, 1991, resulting in the termination of four (4) employees. Grievances on behalf of the terminated employees were filed by the Union, resulting in an arbitration award dated December 19, 1991, reinstating the employees. The arbitrator (A. McCausland), found that the County failed to support its right to terminate for just cause and the arbitrator ordered the four (4) employees reinstated and to be made whole.

The County refused to implement the arbitration award and pursuant to the terms of the collective bargaining agreement, discussions were held between the County and the Union thereafter. The parties dispute the meaning of the post-advisory arbitration language contained in the CBA, but stipulated that the dispute was properly before the Board for its decision as to whether or not the County committed an unfair labor practice by breaching the collective bargaining agreement.

The four (4) employees were discharged by the County as a result of an incident that occurred at the Nursing Home on June 19, 1991. The four (4) employees are certified nursing aides at the home who worked the 11:00 p.m. to 7:00 a.m. shift. On the morning of June 19, 1991, the residents in the unit in which these employees worked were discovered to have been rolled up in their beds to the maximum height, causing some of the residents to slide in their beds or fall over to one side. The grievants denied that they rolled the residents up to the maximum height

during their final rounds that morning and also asserted that they believed that the Director of Nursing had instructed them not to roll residents up. On July 1, 1991, the four (4) employees were terminated and their nursing supervisor was disciplined.

The Union's position was that the County did not have just cause to terminate these employees. At the hearing, the Union maintained that an arbitrator, the Appeals Board of the Department of Employment and the State's Ombudsman have all concluded that just cause did not exist to sustain their terminations.

The County submitted that it did have just cause. The County's position was that the arbitrator erred in not finding just cause. In support of this position, the County asserted that the arbitrator's award was incorrect and that the findings of the State's Elderly Affairs Ombudsman issued on December 12, 1991 contradicted the findings and award of the arbitrator.

The Union argued that the findings of the Ombudsman did not support the allegations nor the termination of these employees and that the clarification issued by the Ombudsman specifically found no individual liability.

The cross claim filed by the County alleged that when the parties met for mediation of their current contract dispute on January 6, 1992, the Union refused to mediate the contract dispute unless the termination grievance was settled favorably. The Union denied the allegations. The mediation session lasted less than one (1) day.

FINDINGS OF FACT

1. Sullivan County is a public employer as defined by RSA 273-A:1 (X) and employs employees in the Sullivan County Nursing Home.

2. AFSCME, Local 3438, is the duly certified bargaining agent of certain employees employed at the Sullivan County Nursing Home.

3. The Union and the County were parties to a collective bargaining agreement which expired on December 31, 1991.

4. Four (4) employees were discharged effective July, 1991 as a result of an incident which occurred on the morning of June 19, 1991.

5. The terminated employees timely filed grievances pursuant to the CBA culminating in arbitration hearings held on September 30 and October 1, 1991.

6. The duly appointed arbitrator submitted his award on December 19, 1991 finding inter alia that just cause did not exist for the termination of the grievants and that they be reinstated and made whole.

7. The County does not allege procedural improprieties with the conduct of the arbitration.

8. The County refused to implement the arbitrator's award.

9. The CBA provides for advisory arbitration.

10. The State Ombudsman (Division of Elderly Adult Services - Department of Health and Human Services) issued a report to the County on December 12, 1991 which found, inter alia, "the supervisor was administratively responsible for all of the residents". It appears that for whatever reason she failed to meet her responsibilities as a nursing manager (supervisor) and concluded that "...on the basis of the findings, the report is unfounded for emotional abuse. However, the report is valid for violation of the residents' right to be treated with dignity and respect." The Ombudsman's report made no recommendations.

11. On February 27, 1992, a clarification was issued by the Ombudsman which found, inter alia, that:

(1) as previously determined, the report is unfounded for emotional abuse and "...therefore it is the determination of the Office of Ombudsman that many of the residents were not treated with dignity and respect as individuals with individual needs and rights. However, due to the lack of clarity and communication, the Office of Ombudsman is vacating its determination as to individual responsibility for these violations of residents' rights."

12. That the Union timely filed a charge of unfair labor practice.

13. The record does not sustain a good faith reason upon which the County could rely to support its refusal to implement the arbitrator's award.

14. The grievants were not terminated for just cause.

15. The parties met for the purpose of mediating their current contract dispute on January 6, 1992.

16. The Union improperly insisted that the termination grievance be settled favorably as a precursor to mediation.

DISCUSSION

Since the parties stipulated that the issue before the Board is a determination of whether the County breached the CBA based on the contract provision related to the just cause provision, we will not address the propriety or meaning of the ambiguous arbitration clause contained in the CBA. The Board finds no cause to upset the findings of the arbitrator in the matter.

The Board will defer to the arbitrator's award in this and all cases unless persuaded that either the conduct of the arbitration hearing was significantly flawed or that the award itself is repugnant to the act or clear public policy. Deference to an arbitrator's award by the courts and labor boards is well established labor policy in this nation. Steelworkers v. Enterprise Wheel and Car Corp., 363 US 593 (1960) and Spielberg Manufacturing Co., 112 NLRB 1080 (1955). Failing a representation and proof that the arbitration proceedings were unfair or irregular, the Board finds, just as has been found on the federal level, that the objective of encouraging the voluntary settlement of labor disputes will be best served by recognition of an arbitrator's award.

In this matter, the County tried to persuade the Board that additional evidence which the County had in its possession when it made its decision not to implement the award, was sufficient to overturn the award or militate in favor of a finding by the Board that just cause existed.

First, this defense fails on the basis that the arbitrator did not have this information before him. The arbitrator has been selected by the parties to interpret and apply the language contained in the agreement. It is the arbitrator's judgment and not the Ombudsman's judgment that has been bargained for between the parties. Secondly, the Ombudsman's finding upon which the County relies, the Board believes, does not favor a contrary finding. The Ombudsman found no reason to make any recommendations to the County and specifically found no individual responsibility.

The County urges the Board to rely on the Ombudsman's first report and ignore the clarification. Not only is this nonsensical, but it emphasizes the fact that each defense put forward by the County has been effectively removed by the findings of the various boards and individuals who have considered their action. Ironically, the only specific individual wrongdoing found by the Ombudsman in either report was that of the nursing supervisor, whose discipline was reversed by this very Board of Commissioners. At hearing, the Chairman of the Commission supported or defended the Commissioners' decision with respect to the supervisor and testified that the Commissioners did not take retroactive action against the

supervisor following the submission of the Ombudsman's report because the Commissioners felt it would be unfair since they did not have that information before them when they made their initial decision. This needs to be contrasted directly against the County's argument that the arbitrator's decision should be ignored under the same circumstances. These are some of the very factors which has led this Board to believe that the County's actions were not supported by good faith reasons.

Although the parties stipulated at the hearing that this matter was properly before the Board, the County surprisingly offered in its post-hearing argument that the unfair labor practice was not timely filed. We find to the contrary. We find that the complaint was not ripe for filing until the grievance process contained in the collective bargaining agreement had been completed.

DECISION

The Board finds in this case that the County committed an unfair labor practice pursuant to RSA 273-A:5 I, (h) by breaching the collective bargaining agreement when it terminated these four (4) employees without just cause. The County is ordered to comply with the award of arbitrator Allan McCausland dated December 19, 1991 and to advise the Board of its compliance within thirty (30) days of the date of this decision.

The Union committed an unfair labor practice in violation of RSA 273-A:5 II, (d) by improperly insisting upon the settlement of the termination grievance as a precursor to good faith mediation efforts on January 6, 1992. The Union is ordered to cease and desist from such further activity.

So Ordered.

Signed this 7th day of OCTOBER, 1992


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
Seymour Osman and Richard E. Molan, Esquire present and voting.